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Ell v. Alberta, [2003] 1 S.C.R. 857, 2003 SCC 35

Her Majesty The Queen in Right of Alberta *Appellant*

v.

Devon Gary Ell, John Michael Maguire and *Respondents*

Roselynne Margaret Spencer

and

Attorney General of Canada, Attorney General of Ontario,

Attorney General of Quebec, Attorney General of British Columbia,

Attorney General for Saskatchewan and Association of Justices

of the Peace of Ontario *Interveners*

Indexed as: Ell *v.* Alberta

Neutral citation: 2003 SCC 35.

File No.: 28261.

2003: February 12; 2003: June 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for alberta

Constitutional law — Judicial independence — Security of tenure — Justices of the peace — Provincial legislation requiring all justices of the peace who exercise judicial functions to meet qualifications decided upon by an independent Judicial Council — Whether legislation infringes guarantees of judicial independence — Whether removal from office of justices of the peace who did not meet qualifications violated their security of tenure — Canadian Charter of Rights and Freedoms, s. 11 (d) — Constitution Act, 1867, preamble — Justice of the Peace Act, R.S.A. 1980, c. J-3, s. 2.4(8) — Justice Statutes Amendment Act, 1998, S.A. 1998, c. 18.

The respondents are challenging the constitutionality of legislative reforms that seek to improve the qualifications and independence of Alberta's justices of the peace. The challenged amendments to the *Justice of the Peace Act* require all justices of the peace who exercise judicial functions to meet qualifications decided upon by an independent Judicial Council. The Judicial Council unanimously agreed on minimum qualifications of membership in the Law Society of Alberta and five years related experience. The respondents, who had been appointed as justices of the peace prior to the amendments, did not meet these requirements. They were removed from office and were offered administrative positions as non-presiding justices of the peace. The respondents applied for a declaration that s. 2.4(8) of the amended *Justice of the Peace Act*, which removed them from office, contravened their constitutionally required security of tenure and independence. The chambers judge granted the application and declared the provision to be of no force and effect as it applied to them. The Court of Appeal upheld the decision.

Held: The appeal should be allowed.

The principle of judicial independence applies to the position of the respondents as a result of their authority to exercise judicial functions directly related to the enforcement of law in the court system and to perform numerous judicial functions that significantly affect the rights and liberties of individuals. The respondents played an important role in assisting the provincial and superior courts in fulfilling the judiciary's constitutional mandate and they were constitutionally required to be independent in the exercise of their duties. The Legislature's removal of the respondents from office did not violate their security of tenure, however, and so did not contravene the principle of judicial independence. The essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office. Removal from office that is reasonably intended to further the interests that underlie the principle of judicial independence — namely, public confidence in the

administration of justice, and the maintenance of a strong and independent judiciary that is able to uphold the rule of law and the values of our Constitution — is not arbitrary. It is evident that in this case the Legislature concluded that the positive impact of the reforms on the interests that underlie judicial independence outweighed any negative impact of the respondents' removal from office. A reasonable and informed person would perceive the legislative amendments to strengthen the qualifications and independence of Alberta's justices of the peace.

The respondents do not dispute the merits of the reforms but argue that the amendments should apply only to new appointments to office. Once it is established that the office is in need of significant structural reform, however, a requirement of "grandfathering" incumbents serves only to delay that reform. Moreover, public confidence in the administration of justice could be harmed by retaining those individuals who do not meet the qualifications for eligibility that an independent Judicial Council, with intimate knowledge of the duties of office, have determined to be the minimum necessary. Finally, the manner in which the reforms were implemented lessened as much as possible the legislation's adverse impact upon the respondents.

Cases Cited

Referred to: *Reference re Adoption Act*, [1938] S.C.R. 398; *R. v. Bush* (1888), 15 O.R. 398; *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13; *Baron v. Canada*, [1993] 1 S.C.R. 416; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35; *R. v. Généreux*, [1992] 1 S.C.R. 259.

Statutes and Regulations Cited

Act of Settlement, 12 & 13 Will. 3, c. 2.

Act to Amend the Justices of the Peace Act, R.S.N.W.T. 1988, c. 39 (Supp.), ss. 5, 8.

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 11(*d*), (*e*).

Constitution Act, 1867, preamble, ss. 92(14), 96 to 100.

Criminal Code, R.S.C. 1985, c. C-46, ss. 2 "justice", 515.

Justice of the Peace Act, R.S.A. 1980, c. J-3, ss. 2.1(1) [ad. 1998, c. 18, s. 3], (2) [*idem*], (5) [*idem*], 2.2 [*idem*], 2.4(8) [*idem*], 5 [rep. 1998, c. 18, s. 3], 5.1 [ad. 1991, c. 21, s. 16; rep. 1998, c. 18, s. 3], 5.2 [*idem*].

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Justices of the Peace Act, 1989, S.O. 1989, c. 46, s. 4(4).

Justice Statutes Amendment Act, 1998, S.A. 1998, c. 18, s. 3.

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APPEAL from a judgment of the Alberta Court of Appeal, [2001] 1 W.W.R. 606, 83 Alta. L.R. (3d) 215, 266 A.R. 266, 25 Admin. L.R. (3d) 17, 49 C.P.C. (4th) 18, [2000] A.J. No. 1101 (QL), 2000 ABCA 248, affirming a decision of the Court of Queen's Bench (1999), 240 A.R. 146, 28 C.P.C. (4th) 342, 60 C.R.R. (2d) 107, [1999] A.J. No. 451 (QL), 1999 ABQB 45. Appeal allowed.

Robert C. Maybank and *Christine Enns*, for the appellant.

Alan D. Hunter, *Q.C.*, *Sheilah L. Martin*, *Q.C.*, and *James T. Eamon*, for the respondents.

David Sgayias, *Q.C.*, and *Jan Brongers*, for the intervener the Attorney General of Canada.

Janet E. Minor and *Sean Hanley*, for the intervener the Attorney General of Ontario.

Monique Rousseau and *Julie Dassylva*, for the intervener the Attorney General of Quebec.

George H. Copley, *Q.C.*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, Q.C., for the intervener the Attorney General for Saskatchewan.

Paul B. Schabas and *Catherine Beagan Flood*, for the intervener the Association of Justices of the Peace of Ontario.

The judgment of the Court was delivered by

1 MAJOR J. — At issue in this appeal is the constitutionality of legislative reforms that seek to improve the qualifications and independence of Alberta's justices of the peace. The challenged amendments to the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, require all justices of the peace who exercise judicial functions to meet qualifications decided upon by an independent Judicial Council.

2 The respondents, and other justices of the peace appointed prior to the amendments, did not meet the qualifications. They were removed from office, but were offered administrative positions as non-presiding justices of the peace.

3 The courts below held that the removal of the respondents from office contravenes the principle of judicial independence. With respect, I disagree. The principle of judicial independence must be interpreted in light of the public interests it is meant to protect: a strong and independent judiciary capable of upholding the rule of law and our constitutional order, and public confidence in the administration of justice. The reforms in this case reflect a good faith and considered decision of the Legislature that was intended to promote these interests. As a result, the legislation does not undermine the perception of independence in the mind of a reasonable and informed person, and is respectful of the principle of judicial independence. I would allow the appeal.

I. Factual Background

4 Justices of the peace have played an important role in Canada's administration of justice since the adoption of the position from England in the 18th century. It has long been accepted that s. 92 (14) of the *Constitution Act, 1867* confers upon the provinces full control over the appointment and regulation of these judicial officers. See *Reference re Adoption Act*, [1938] S.C.R. 398, *per* Duff C.J., at p. 406, citing *R. v. Bush* (1888), 15 O.R. 398 (Q.B.), at p. 405:

> The administration of justice could not be carried on in the Provinces effectually without the appointment of justices of the peace and police magistrates, and the conclusion seems to me to be irresistible that it was intended that the appointment of these and other officers, whose duty it should be to aid in the administration of justice, should be left in the hands of the Provincial Legislatures.

5 The powers and authority of justices of the peace have waxed and waned over time and across the country. In many provinces, they have come to occupy a critical role as the point of entry into the criminal justice system, with jurisdiction over bail hearings and the issuance of search warrants. As a result of an increased recognition of their important functions, numerous commissions have issued reports describing problems with the office and making recommendations for change: see Hon. J. C. McRuer, *Royal Commission Inquiry Into Civil Rights* (1968), Report No. 1, vol. 2, c. 38 ("McRuer Commission"); A. W. Mewett, *Report to the Attorney General of Ontario on the Office and Function of Justices of the Peace in Ontario* (1981) ("Mewett Report"); J. E. Klinck, *Report of the Justice of the Peace Committee* (1986); the Manitoba Law Reform Commission, *The Independence of Justices of the Peace and Magistrates* (1991), Report No. 75 ("Manitoba Report"); and A. N. Doob, P. M. Baranek and S. M. Addario, *Understanding Justices: A Study of Canadian Justices of the Peace* (1991) ("Doob Report").

6 These reports have invariably indicated a pressing need to improve both the independence and qualifications of justices of the peace. The McRuer Commission concluded, at p. 524, with regard to Ontario's justices of the peace:

> . . . the whole concept, that the office should stand as a safeguard of the civil rights of the individual against the exercise of arbitrary police power, is in many cases, and probably in most cases, little more than a sham. In saying this we do not want to be taken as condemning individuals. We are condemning a system under which many conscientious and dedicated individuals are required to work.

Many provinces have enacted significant reforms since then in an effort to meet the stated concerns: in Ontario, the *Justices of the Peace Act, 1989*, S.O. 1989, c. 46,

s. 4(4); in Saskatchewan, *The Justices of the Peace Act, 1988*, S.S. 1988-89, c. J-5.1, s. 6(7); and in the Northwest Territories, *An Act to Amend the Justices of the Peace Act*, R.S.N.W.T. 1988, c. 39 (Supp.), ss. 5 and 8.

7 Alberta enacted legislative reforms to the office in 1991: see the *Miscellaneous Statutes Amendment Act, 1991*, S.A. 1991, c. 21, s. 16. The legislation brought in two significant changes. First,

security of tenure was provided for all justices of the peace until age 70. Removal could only be for cause following a recommendation of the Justices of the Peace Review Council. Second, in an effort to tailor the qualifications of justices of the peace to their specific duties, the office was divided into the categories of sitting and non-sitting justices of the peace. Sitting justices of the peace were authorized to preside over trials of less serious offences and to sit in Provincial Court. Appointment to this position required membership in the Law Society of Alberta and five years of related experience.

8 Non-sitting justices of the peace were not required to meet any eligibility criteria, apart from Canadian citizenship. These judicial officers were authorized to preside over judicial interim release; to issue search warrants, summons, subpoenas and arrest warrants; and to confirm or cancel police process. They also performed numerous administrative tasks, including receiving information and affidavits, scheduling trials and hearing dates, and administering oaths. The position was divided into four sub-categories: hearing officers, who worked full-time on salary; *ad hoc* justices, who worked part-time on a per diem basis; fee justices, who were paid per transaction; and staff justices, who were employed and paid by the Department of Justice.

9 In 1998, Alberta enacted more extensive reforms, which are the subject of the present appeal. The purpose of the amendments, as expressed by Alberta's Minister of Justice, was

> to ensure the independence of the courts of Alberta in keeping with the recent decisions of the Supreme Court of Canada.
>
> (*Alberta Hansard*, March 11, 1998, at p. 811)

In a further effort to ensure that justices of the peace are qualified for the duties they perform, the amendments replace the office of non-sitting justices of the peace with the positions of presiding and non-presiding justices of the peace. In essence, presiding justices of the peace assume the judicial tasks that had previously been assigned to the non-sitting justices of the peace, and non-presiding justices of the peace are limited to their administrative tasks.

10 The amendments stipulate that in order to be appointed as a sitting or presiding justice of the peace, a person must be deemed qualified by an independent Judicial Council: *Justice Statutes Amendment Act, 1998*, S.A. 1998, c. 18, s. 2.1(1). The Judicial Council unanimously agreed on minimum qualifications of membership in the Law Society of Alberta and five years related experience. The amendments also bar persons who suffer from inherent conflicts of interest (such as government employees, law enforcement officers, prosecutors, and prison guards) from appointment: s.

2.1(5). Individuals who had previously been appointed but did not meet these requirements were precluded from holding office: s. 2.4(8). They were offered administrative positions as non-presiding justices of the peace.

11 Of the several hundred non-sitting justices of the peace appointed prior to the amendments, only 15 *ad hoc* justices met the objective requirements for appointment as presiding justices of the peace. The three respondents, who were classified as hearing officers and lacked the new qualifications, were not appointed to that office, nor were the approximately 200 fee justices and 250 staff justices. They were offered positions as non-presiding justices of the peace.

12 The respondents brought an application to the Alberta Court of Queen's Bench for a declaration that s. 2.4(8), which removed them from office, contravened their constitutionally required security of tenure and independence. The chambers judge granted the application and declared the provision to be of no force and effect as it applied to them. The Court of Appeal for Alberta upheld the finding of the chambers judge. The Province appeals from that decision.

II. Relevant Statutory Provisions

13 The following provisions of the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, subsequently repealed under the *Justice Statutes Amendment Act, 1998*, are relevant:

> **5** The appointment of a justice of the peace terminates when he attains the age of 70 years.
>
> **5.1(1)** The Lieutenant Governor in Council shall, subject to the regulations, establish a Justices of the Peace Review Council.
>
> **(2)** The Justices of the Peace Review Council shall
>
> (a) review complaints respecting the lack of competence of, conduct or misbehaviour of, or neglect of duty by, justices of the peace or the inability of justices of the peace to perform their duties, and

(b) make recommendations to the Lieutenant Governor in Council in respect of matters reviewed under clause (a).

5.2 Notwithstanding section 5, the appointment of a justice of the peace may be terminated by the Lieutenant Governor in Council on the recommendation of the Justices of the Peace Review Council.

The relevant 1998 amendments to the *Justice of the Peace Act* are:

2.1(1) The Lieutenant Governor in Council may appoint a person as a justice of the peace designated as a sitting justice of the peace or as a presiding justice of the peace if the Judicial Council has determined that the person is qualified.

(2) An order under subsection (1) shall designate the person appointed as a sitting justice of the peace or as a presiding justice of the peace and shall designate whether the appointment is full-time or part-time.

2.2(1) The Minister may appoint a person as a justice of the peace designated as a non-presiding justice of the peace.

(2) A non-presiding justice of the peace is appointed as a justice of the peace solely for the purposes of exercising the following, to the extent that their exercise is consistent with the constitutional requirements for independence, if any:

(a) administering oaths or affirmations or taking declarations;

(b) processing judicial interim release orders;

(c) adjourning cases where a judge of the Provincial Court or a sitting justice of the peace is not present;

(d) performing any other functions and duties prescribed by the regulations.

2.4 . . .

(8) A person appointed as a justice of the peace before the coming into force of this section who is not appointed under section 2.1(1) or 2.2 may not exercise any authority or receive any remuneration as a justice of the peace after this section comes into force.

III. Judicial History

14 At the Alberta Court of Queen's Bench, McMahon J. held that the respondents carried out judicial functions ((1999), 240 A.R. 146, 1999 ABQB 45). As such, their position attracted the constitutional principle of judicial independence. The chambers judge noted that security of tenure was at the core of this principle. He held that the retroactive imposition of an educational requirement that the respondents could not meet, and their subsequent removal from office, would necessarily undermine the perception of independence to a reasonable and informed person. As a result, he concluded that s. 2.4(8) was constitutionally invalid and was of no force and effect insofar as it relates to the respondents. He declared that the respondents should continue to serve as non-sitting justices of the peace and enjoy security of tenure in accordance with ss. 5, 5.1 and 5.2 of the *Justice of the Peace Act*.

15 The Alberta Court of Appeal dismissed the appeal and upheld the declaration of the chambers judge ([2001] 1 W.W.R. 606, 2000 ABCA 248). That court observed that the essence of security of tenure requires protection "against interference by the Executive or other appointing authority in a discretionary or arbitrary manner": see *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 698. The Court of Appeal held that this standard required that a judicial officer be removable from office only for cause following a hearing by an independent tribunal. In this case, cause has not been alleged. Accordingly, the removal of the respondents from office violated their security of tenure and contravened the principle of independence.

IV. Issues

16 The Chief Justice stated the following constitutional questions on May 1, 2002:

1. Does s. 2.4(8) of the *Justice of the Peace Act*, R.S.A. 1980, c. J-3, as amended, interfere with the tenure of non-sitting justices of the peace and thereby violate the principle of judicial independence guaranteed by:

(a) the preamble of the *Constitution Act, 1867*, or

(b) section 11(*d*) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question 1(b) is yes, is the Act demonstrably justified as a reasonable limit prescribed by law under s. 1 of the *Charter*?

V. Analysis

17 The primary issues in this appeal are whether the principle of judicial independence extends to the office of the respondents, and if so, whether the legislated removal of the respondents from office contravenes that principle. I agree that the principle applies to the position of the respondents as a result of their authority to exercise judicial functions. However, I conclude that the amendments at issue do not violate the constitutional essence of the respondents' security of tenure, and so do not contravene the principle of judicial independence.

A. *The Scope of Judicial Independence*

18 Judicial independence has been recognized as "the lifeblood of constitutionalism in democratic societies": see *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 70, *per* Dickson C.J. It requires objective conditions that ensure the judiciary's freedom to act without interference from any other entity. The principle finds explicit constitutional reference in ss. 96 to 100 of the *Constitution Act, 1867* and s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*. The application of these provisions is limited: the former to judges of superior courts, and the latter to courts and tribunals that determine the guilt of those charged with criminal offences: see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Court Judges Reference*"), at para. 84, *per* Lamer C.J. The respondents do not fall into either of these categories. Nonetheless, as this

Court has recognized, the principle of judicial independence extends beyond the limited scope of the above provisions.

19 Judicial independence has been a cornerstone of the United Kingdom's constitutional structure back to the *Act of Settlement* of 1700, 12 & 13 Will. 3, c. 2. See the comments of Lord Lane, cited in *Beauregard*, *supra*, at p. 71:

> Few constitutional precepts are more generally accepted there in England, the land which boasts no written constitution, than the necessity for the judiciary to be secure from undue influence and autonomous within its own field ("Judicial Independence and the Increasing Executive Role in Judicial Administration", in S. Shetreet and J. Deschênes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at p. 525).

The preamble to the *Constitution Act, 1867* provides for Canada to have "a Constitution similar in Principle to that of the United Kingdom". These words, by their adoption of the basic principles of the United Kingdom's Constitution, serve as textual affirmation of an unwritten principle of judicial independence in Canada. Lamer C.J. concluded as follows in *Provincial Court Judges Reference*, *supra*, at para. 109:

> . . . it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.

The preamble acknowledges judicial independence to be one of the pillars upon which our constitutional democracy rests.

20 Historically, the principle of judicial independence was confined to the superior courts. As a result of the expansion of judicial duties beyond that realm, it is now accepted that all courts fall within the principle's embrace. See *Provincial Court Judges Reference*, *supra*, at para. 106:

> . . . our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the *Constitution Act, 1982*, so too has judicial independence grown into a principle that now extends to all courts, not just the superior courts of this country.

The scope of the unwritten principle of independence must be interpreted in accordance with its underlying purposes. In this appeal, its extension to the office held by the respondents depends on whether they exercise judicial functions that relate to the bases upon which the principle is founded.

21 The historical rationale for independence was to ensure that judges, as the arbiters of disputes, are at complete liberty to decide individual cases on their merits without interference: see *Beauregard*, *supra*, at p. 69. The integrity of judicial decision making depends on an adjudicative process that is untainted by outside pressures. This gives rise to the individual dimension of judicial independence, that is, the need to ensure that a particular judge is free to decide upon a case without influence from others.

22 In modern times, it has been recognized that the basis for judicial independence extends far beyond the need for impartiality in individual cases. The judiciary occupies an indispensable role in upholding the integrity of our constitutional structure: see *Provincial Court Judges Reference*, *supra*, at para. 108. In Canada, like other federal states, courts adjudicate on disputes between the federal and provincial governments, and serve to safeguard the constitutional distribution of powers. Courts also ensure that the power of the state is exercised in accordance with the rule of law and the provisions of our Constitution. In this capacity, courts act as a shield against unwarranted deprivations by the state of the rights and freedoms of individuals. Dickson C.J. described this role in *Beauregard*, *supra*, at p. 70:

> [Courts act as] protector of the Constitution and the fundamental values embodied in it — rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.

This constitutional mandate gives rise to the principle's institutional dimension: the need to maintain the independence of a court or tribunal as a whole from the executive and legislative branches of government.

23 Accordingly, the judiciary's role as arbiter of disputes and guardian of the Constitution require that it be independent from all other bodies. A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to "claim any legitimacy or command the respect and acceptance that are essential to it": see *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405, 2002 SCC 13, at para. 38, *per* Gonthier J. The principle requires the judiciary to be independent both in fact and perception.

24 In light of these bases of judicial independence — impartiality in adjudication, preservation of our constitutional order, and public confidence in the administration of justice — it is clear that the principle extends its protection to the judicial office held by the respondents. Alberta's non-sitting justices of the peace exercised judicial functions directly related to the enforcement of law in the court system. They served on the front line of the criminal justice process, and performed numerous judicial functions that significantly affected the rights and liberties of individuals. Of singular importance was their jurisdiction over bail hearings. Justices of the peace are included in the definition of "justice" under s. 2 of the *Criminal Code*, R.S.C. 1985, c. C-46, and the respondents were thereby authorized to determine judicial interim release pursuant to s. 515 of the *Code*. Decisions on judicial interim release impact upon the right to security of the person under s. 7 of the *Charter* and the right not to be denied reasonable bail without just cause under s. 11(*e*). Professor Friedland commented upon the importance of bail hearings in *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965), at p. 172:

> The period before trial is too important to be left to guess-work and caprice. At stake in the process is the value of individual liberty. Custody during the period before trial not only affects the mental, social, and physical life of the accused and his family, but also may have a substantial impact on the result of the trial itself. The law should abhor any unnecessary deprivation of liberty and positive steps should be taken to ensure that detention before trial is kept to a minimum.

The respondents were required to exercise significant judicial discretion in adjudicating on these matters.

25 The respondents also had the authority to issue search warrants, which impact upon the right to be secure from unreasonable search and seizure under s. 8 of the *Charter*. Sopinka J. described the effect of search warrants on the right to privacy in *Baron v. Canada*, [1993] 1 S.C.R. 416, at pp. 444-45:

> Physical search of private premises . . . is the greatest intrusion of privacy short of a violation of bodily integrity. . . .
>
> Warrants for the search of any premises constitute a significant intrusion on the privacy of an individual that is both upsetting and disruptive.

In that case, the Court concluded at p. 439 that the issuance of search warrants constitutionally required discretion to be exercised by a judicial officer who remains independent from the state and its agents.

26 Each of the above judicial responsibilities makes clear that the respondents played an important role in assisting the provincial and superior courts in fulfilling the judiciary's constitutional mandate. The following conclusion of Professor Mewett on Ontario's justices of the peace is equally applicable to the respondents (Mewett Report, at p. 39):

> . . . the Justice of the Peace is the very person who stands between the individual and the arbitrary exercise of power by the state or its officials. It is essential that an independent person be the one to determine whether process should issue, whether a search warrant should be granted, whether and on what terms an accused should be released on bail and so on. This is a fundamental principle . . . [that] must be zealously preserved.

It is obvious the respondents were constitutionally required to be independent in the exercise of their duties.

27 This review leads to the substance of judicial independence and to whether the legislation at issue contravenes this principle.

B. *The Essential Conditions of Independence*

28 As stated, judicial independence encompasses both an individual and institutional dimension. The former relates to the independence of a particular judge, and the latter to the independence of the court to which the judge is a member. Each of these dimensions depends on objective conditions or guarantees that ensure the judiciary's freedom from influence or any interference by others: see *Valente*, *supra*, at p. 685. The requisite guarantees are security of tenure, financial security and administrative independence: see *Provincial Court Judges Reference*, *supra*, at para. 115.

29 The principal question in this case is whether the Legislature's removal of the respondents from office contravened their security of tenure. In assessing this issue, it must be considered that the conditions of independence are intended to protect the interests of the public. Judicial independence serves not as an end in itself, but as a means to safeguard our constitutional order and to maintain public confidence in the administration of justice: see *Provincial Court Judges Reference*, *supra*, at para. 9. The principle exists for the benefit of the judged, not the judges. If the conditions of independence are not "interpreted in light of the public interests they were intended to serve, there is a danger that their application will wind up hurting rather than enhancing public confidence in the courts": see *Mackin*, *supra*, at para. 116, *per* Binnie J., in his dissent.

30 The manner in which the essential conditions of independence may be satisfied varies in accordance with the nature of the court or tribunal and the interests at stake. See *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, at para. 83, *per* Lamer C.J., and *Therrien (Re)*, [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 65, where the Court advocated a contextual approach to judicial independence:

> . . . although it may be desirable, it is not reasonable to apply the most elaborate and rigorous conditions of judicial independence as constitutional requirements, since s. 11(*d*) of the *Canadian Charter* may have to be applied to a variety of tribunals. These essential conditions should instead respect that diversity and be construed flexibly. Accordingly, there should be no uniform standard imposed or specific legislative formula dictated as supposedly prevailing. It will be sufficient if the essence of these conditions is respected . . .

31 The level of security of tenure that is constitutionally required will depend upon the specific context of the court or tribunal. Superior court judges are removable only by a joint address of the House of Commons and the Senate, as stipulated by s. 99 of the *Constitution Act, 1867*. This level of tenure reflects the historical and modern position of superior courts as the core of Canada's judicial structure and as the central guardians of the rule of law. Less rigorous conditions apply in the context of provincial courts, which are creatures of statute, but which nonetheless perform significant constitutional tasks. See *Mackin*, *supra*, at para. 52:

> . . . the provincial judiciary has important constitutional functions to perform, especially in terms of what it may do: ensure respect for the primacy of the Constitution under s. 52 of the *Constitution Act, 1982*; provide relief for violations of the *Charter* under s. 24; apply ss. 2 and 7 to 14 of the *Charter*; ensure compliance with the division of powers within Confederation under ss. 91 and 92 of the *Constitution Act, 1867*; and render decisions concerning the rights of the aboriginal peoples protected by s. 35(1) of the *Constitution Act, 1982*.

While the respondents have important duties, their jurisdiction is considerably more limited than that of provincial court judges. Their role in upholding the Constitution is narrower in scope. As a result, less stringent conditions are necessary in order to satisfy their security of tenure.

32 The ultimate question in each case is whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent: *Valente*, *supra*, at p. 689. The perception of independence will be upheld if the essence

of each condition of independence is met. The essence of security of tenure is that members of a tribunal be free from arbitrary or discretionary removal from office. See *Valente*, *supra*, at

p. 698:

> The essence of security of tenure for purposes of s. 11(*d*) is a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the Executive or other appointing authority in a discretionary or arbitrary manner.

33 In my view, a removal from office that is reasonably intended to further the interests that underlie the principle of judicial independence is not arbitrary. Those interests, as noted above, are public confidence in the administration of justice, and the maintenance of a strong and independent judiciary that is able to uphold the rule of law and the values of our Constitution. If the removal from office is necessary in the promotion of these interests, then it cannot be considered arbitrary, and would not undermine the perception of independence in the mind of a reasonable and informed person.

34 This Court has previously held that a legislative structure that permitted the removal of a judicial officer without cause by the Executive will generally be considered arbitrary: see *Valente*, *supra*, at p. 698; *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 285; and *Matsqui*, *supra*, at para. 101. That issue does not arise in this appeal. Neither party submitted that the legislative guarantees against Executive interference were insufficient.

35 In this case, the question is whether the removal of the respondents from office by the Legislature is arbitrary. With respect to the contrary view of the Court of Appeal, the requirement of cause cannot be rigidly applied in this context without consideration of the purpose of judicial independence. If the removal of the respondents from office reflects a good faith and considered decision of the Legislature intended to advance the public interests that judicial independence is meant to protect, then the prevention of this removal will serve only to frustrate these interests.

36 Tenure cannot be viewed as an absolute. If an absolute, necessary reforms would be almost impossible. Conversely, to accept the need for reform in required circumstances is to acknowledge that individual persons may be affected. A legislated change resulting in a removal from office undertaken upon the advice of an independent Judicial Council is justified if it is necessary to accommodate significant reforms that are considered integral to public confidence in the administration of justice. Legislative action of this kind is neither arbitrary nor discretionary. In contrast, removal without cause by the Executive could not be justified on this basis, and would almost certainly be arbitrary.

37 In light of the circumstances that led to the present reforms, it is evident that a reasonable and informed person would perceive the amendments to strengthen, rather than diminish, the independence and qualifications of Alberta's justices of the peace. It is evident that the Legislature concluded that the positive impact of the reforms on the interests that underlie judicial independence outweighs any negative impact of the respondents' removal from office. Their removal was necessary to give effect to those reforms. As such, the respondents' removal cannot be said to be arbitrary, and does not violate the principle of judicial independence.

38 This conclusion is reached on several considerations. First, it is uncontested that the provisions at issue were enacted to serve the public good. There is no suggestion that the amendments were a disguised attempt to remove any particular justices of the peace from office. To the contrary, the particular qualifications were set by an independent Judicial Council. The reforms were designed to alleviate institutional impediments to the independence and qualifications of justices of the peace. In *Valente*, *supra*, this Court determined that the involvement of a provincial Judicial Council in tenure issues went a considerable distance to secure judicial independence which, in turn, removed any reasonably held concerns that this was an arbitrary or discretionary measure: pp. 703-4. The Legislature's good faith removes the possibility of a chilling effect on presiding justices of the peace under the new regime.

39 Second, the need to improve both the independence and competence of Alberta's justices of the peace was amply demonstrated by the recommendations of the independent commissions mentioned above. As the chambers judge observed, "the proposed changes have great merit. The need for change has been demonstrated several times over" (para. 54). The substance of the legislation reflected the recommendations of the various reports, and aligns closely with the conclusions of the Manitoba Report (1991), the most recent Canadian study available.

40 The Manitoba Report suggested a classification of the office into three categories, with the duties of justices of the peace in each category stipulated by statute or regulations (p. 52). It recommended that qualifications for office be left to an independent committee chaired by the Chief Judge of the Provincial Court, and that individuals with inherent conflicts of interest be barred from office (p. 59). Finally, it suggested that in order to implement the reforms in a timely fashion, incumbents that failed to meet the new qualifications be removed from office, but in a manner that ensured the least possible disruption to their career (p. 76).

41 Alberta's legislative amendments follow all of these recommendations. Each change is clearly designed to improve the independence and qualifications of Alberta's justices of the peace, with consideration given to the disruption of the careers of those removed from previous duties.

(1) Reclassification of Duties

42 Alberta's amendments divide justices of the peace into the three categories of sitting, presiding, and non-presiding justices. This permits a precise delineation by statute and regulations of the jurisdiction of each office. In the past, the jurisdiction of each non-sitting justice of the peace was determined by administrative directive in the form of "letters of authority" from the Chief Judge of the Provincial Court. As a result of the varying qualifications of the non-sitting justices, and the different duties required of them, the system was unworkable. Since there were no eligibility requirements for office, there was little assurance that justices were qualified for the particular duties assigned to them. The amendments allow for the qualifications of each justice to be appropriately tailored to the scope of his or her duties.

43 As well, prior to the amendments there was a danger that the perception of independence would be fettered by the significant administrative discretion vested in the supervisory role of the Chief Judge. See the Manitoba Report, at p. 51:

> Limitation by administrative directive also carries the disadvantage that it may be perceived as a means to carry out a back-door disciplinary process, a perception that should be eliminated by statutory limits which can be regulated and administered publicly.

The clarification of the scope of each officer's jurisdiction reduces this administrative discretion and alleviates the danger that the perception of independence would be undermined in this regard.

(2) Removal of Conflicts of Interest

44 The amendments bar persons with inherent conflicts of interest from appointment to office as sitting or presiding justices of the peace: s. 2.1(5). These persons include government employees, law enforcement officers, prosecutors, and prison wardens. At the time of the amendments, several hundred non-sitting justices of the peace were employees of the Department of Justice. The employment of judicial officers by the executive branch of government was a significant taint on the perception of the office's independence. Their removal from judicial office alleviates that.

(3) Qualifications Set by an Independent Judicial Council

45 Historically, there was a widespread belief that appointment to office was solely on political grounds. The McRuer Commission (1968) described the situation in Ontario as a "mockery of judicial office [that is] bound to depreciate respect for law and order in the community" (p. 518). It is hoped that patronage in the appointment process has been at least lessened if not eradicated since the time of that report. Unquestionably, the perception that appointment to judicial office is political in nature undermines public confidence in the administration of justice.

46 One step towards ameliorating this perception was to require that candidates for office meet qualifications decided upon by an independent committee that is divorced from political influence. In this appeal the Alberta amendments stipulated that no person may be appointed as a sitting or presiding justice of the peace unless he or she meets qualifications determined by the Judicial Council: s. 2.1(1). The setting of qualifications for office by this independent committee counters the perception of patronage in the appointment process.

47 The delegation of this task to an independent Judicial Council also ensures that appropriate qualifications are set by a body that is familiar with the duties demanded of justices of the peace and the level of education and training required to discharge those duties. The Manitoba Report observed at p. 58:

> . . . we are of the opinion that the Committee itself should determine the level of educational preparation to be required. This is especially appropriate, given that those charged with the training and supervision of justices of the peace are represented on the Committee.

The Judicial Council unanimously agreed that a minimum requirement for appointment is membership in good standing of the Law Society of Alberta with at least five years related experience at the bar.

48 These eligibility criteria are reasonable in light of the judicial functions of sitting and presiding justices of the peace and their significant impact on the rights and liberties of individuals. The Doob Report noted that 84 percent of justices of the peace surveyed in Ontario and British Columbia thought "it would be helpful to justices to have some formal training in law before being appointed" (p. 64). It is a sensible conclusion that minimum requirements of education and experience for justices of the peace will tend to improve the quality of legal decisions. Increased training also reduces the reliance of individual officers on the advice of others, thereby increasing their independence in decision making.

(4) Application of the Reforms to the Respondents

49 The respondents do not dispute the merits of the above reforms. They argue, however, that the amendments should apply only to new appointments to office. I disagree. As many of the reports observed, once it is established that the office is in need of significant structural reform, a requirement of "grandfathering" incumbents serves only to delay that reform. See the Manitoba Report, at pp. 75-76:

> Because justices of the peace and magistrates may hold office for many years, a solution which did not affect those presently appointed would have no appreciable impact for a very long time.

Reforms in Ontario, Saskatchewan, and the Northwest Territories did not include provisions to grandfather incumbents. In this appeal, the requirement of removal only for cause would mandate that, in addition to the respondents, the 190 fee justices and 242 staff justices would hold office until retirement. This would preclude any meaningful implementation of reforms for many years. Such delay, in the face of a demonstrated need for change, does not serve the interests of the public.

50 Moreover, public confidence in the administration of justice could be harmed by retaining those individuals who do not meet the qualifications for eligibility that an independent Judicial Council, with intimate knowledge of the duties of office, have determined to be the minimum necessary. Regardless of whether the respondents are in fact qualified for office, their failure to meet these minimum educational criteria could undermine the perception of their qualifications in the minds of the individuals who come before them.

51 Finally, the manner in which the reforms were implemented lessened as much as possible the legislation's adverse impact upon the respondents. The respondents were offered appointment as non-presiding justices of the peace. This position comprises the administrative functions that they had performed as non-sitting justices of the peace. Although the position lacks security of tenure, it entitles the respondents to receive the equivalent pay and benefits as they did in their previous office.

(5) Conclusion

52 In light of these factors, I conclude that a reasonable and informed person would perceive the legislative amendments to strengthen the qualifications and independence of Alberta's justices of the peace. The reforms are the result of the Legislature's considered and thorough judgment that changes to the office are necessary to serve the public good by advancing the underlying interests of judicial

independence. They strengthen the ability of justices of the peace to uphold the Constitution and adjudicate disputes, and improve public confidence in the administration of justice. The removal of the respondents from their positions is not arbitrary or discretionary, and does not undermine the reasonable and informed person's perception of independence.

53 I respectfully disagree with the conclusion reached by the courts below. In my view, s. 2.4 (8) does not contravene the principle of judicial independence as it applies to the respondents.

C. *Section 1 of the Charter*

54 In light of the conclusion that s. 11(*d*) of the *Charter* is not engaged in this case, it is unnecessary to consider whether the Act is justified under s. 1.

VI. Disposition

55 Accordingly, I would allow the appeal without costs in this Court and, in light of the unique circumstances of this case, would not interfere with the costs awarded in the courts below.

56 The constitutional questions are answered as follows:

Answer to question 1: No.

Answer to question 2: It is unnecessary to answer this question.

Appeal allowed.

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Solicitors for the respondents: Code Hunter, Calgary.

Solicitor for the intervener the Attorney General of Canada: Deputy Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

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Solicitor for the intervener the Attorney General of British Columbia. Ministry of the Attorney General, Victoria.

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